(31) (97)

Nos. 01-1118, 01-1119

SEP 17 2002

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ET AL.
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

OPERATION RESCUE
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, ET AL. IN SUPPORT OF RESPONDENTS

(LIST OF AMICI CURIAE ON INSIDE COVER)

Of Counsel
BONNIE J. CAMPBELL
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE R. KUCIK
Counsel of Record
J. MARCUS MEEKS
BONNIE L. KANE
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 857-6084

LIST OF AMICI CURIAE

The Religious Coalition for Reproductive Choice, Disciples for Choice, Americans for Religious Liberty (ARL), The American Humanist Association (AHA), The National Council of Jewish Women, Inc. (NCJW), United Church of Christ Justice and Witness Ministries, Lutheran Women's Caucus, The Women's Rabbinic Network of the Central Conference of American Rabbis, The Unitarian Universalist Association

QUESTIONS PRESENTED

1. Whether a private party may obtain injunctive relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964.

2. Whether the use of force, violence and fear to induce medical clinics to stop providing reproductive health services to their patients is extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF AMICI CURIAE 1

INTRODUCTION 3

SUMMARY OF ARGUMENT 6

(1) Injunctive Relief is Legally Appropriate in Private RICO Lawsuits 6

(2) Intangible Property Rights are Protected Against Extortion by the Hobbs Act 7

ARGUMENT 8

I. RICO AUTHORIZES THE DISTRICT COURTS TO GRANT INJUNCTIVE RELIEF IN PRIVATE LAWSUITS 8

A. RICO's Plain Language and Structure Authorize Injunctive Relief to Private Plaintiffs 8

B. RICO Does Not Expressly Preclude An Award of Injunctive Relief to Private Plaintiffs 10

Table Of Contents Con't

Page

C. Analysis of the Clayton Act's Equitable Relief Provisions Does Not Support a Different Result 12

D. Public Policy Supports the Seventh Circuit's Holding that RICO Authorizes Injunctive Relief to Private Parties 14

II. THE USE OF FORCE, VIOLENCE OR FEAR TO PREVENT A BUSINESS FROM EXERCISING CONTROL OVER ITS INTANGIBLE PROPERTY RIGHTS IS EXTORTION UNDER THE HOBBS ACT 15

A. Hobbs Act "Property" Includes Intangible Things of Value and the Right to Use and Control Them 15

B. An Extortionist "Obtains" a Victim's Intangible Property Rights When He Prevents the Victim From Using or Exercising Control Over Those Rights 18

C. Defendants' Liability will not Convert Constitutionally Protected Acts of Peaceful Civil Disobedience into Illegal Extortion 20

CONCLUSION 22

APPENDIX A-- Statements of Each Amicus Curiae 1a

TABLE OF AUTHORITIES

FEDERAL CASES

Cases Cited **Page**

Aetna Casualty & Surety Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983), *aff'd*, 730 F.2d 905 (2d Cir. 1984) 11

Bell v. Hood, 327 U.S. 678 (1946) 12

Buchanan v. Warley, 245 U.S. 60 (1917) 16

Califano v. Yamasaki, 442 U.S. 682 (1979) 10

Carpenter v. United States, 484 U.S. 19 (1987) 16

Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp. 1528 (W.D. Pa. 1984) 10

Evans v. United States, 504 U.S. 255 (1992) 17

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 10, 12

G-I Holdings, Inc. v. Baron & Budd, 179 F. Supp. 2d 233 (S.D.N.Y. 2001) 16

McNally v. United States, 483 U.S. 350 (1987) 16

Table Of Authorities Con't

Cases Cited **Page**

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002) 11

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 5, 20, 22

NOW, Inc. v. Scheidler, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. Jul. 16, 1999) 6, 14

NOW, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, _ U.S. __, 122 S. Ct. 1604 (2002) 4, 5, 6, 7, 20

Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) 15, 18

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 22

Religious Technology Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 6

Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 (1985) 11

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 9

Table Of Authorities Con't

Cases Cited Page

United States v. Arena, 180 F.3d 380 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000) 15, 18, 19

United States v. Cullen, 454 F.2d 386 (7th Cir. 1971) 22

United States v. Debs, 949 F.2d 199 (6th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992) 15

United States v. Green, 350 U.S. 415 (1956) 19

United States v. Hathaway, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976) 15, 16

United States v. Hoelker, 765 F.2d 1422 (9th Cir. 1985.), *cert. denied*, 415 U.S. 1024 (1986) 15

United States v. Lewis, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) 15, 16

United States v. Mitchell, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) 21

Table Of Authorities Con't

Cases Cited Page

United States v. Santoni, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979) 15, 19, 20

United States v. Stephens, 964 F.2d 424 (5th Cir. 1992) 15, 20

United States v. Stillo, 57 F.3d 553 (7th Cir.), *cert. denied*, 516 U.S. 945 (1995) 19

United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969) 15, 16, 18, 20

United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) 15, 20

STATE CASES

Cases Cited Page

People ex rel. Short v. Warden of City Prison, 130 N.Y.S. 698 (N.Y. App. Div. 1911) 17

People v. Barondess, 16 N.Y.S. 436 (N.Y. Sup. Ct. 1891), *dissent adopted*, 31 N.E. 240 (N.Y 1892) 17

People v. Spatarella, 313 N.E.2d 38 (N.Y. 1974) 17

Table Of Authorities Con't

Cases Cited	Page
Spann v. City of Dallas, 235 S.W. 513 (Tex. 1921)	18

FEDERAL STATUTES

Statutes Cited	Page
15 U.S.C. § 15	12
15 U.S.C. § 25	13
15 U.S.C. § 26	13
18 U.S.C. § 1951	6, 7
18 U.S.C. § 1962	8, 9, 12
18 U.S.C. § 1964	*passim*
Pub. L. No. 91-452, § 904(a), 84 Stat. 922 (1970)	11

MISCELLANEOUS

89 Cong. Rec. 3217 (1943)	21
73 C.J.S. § 5 (1983)	17
Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (Harvard University Press 1942)	3

Nos. 01-1118, 01-1119

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ET AL.
Petitioners,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

OPERATION RESCUE
Petitioner,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, ET AL. IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are voluntary associations of persons committed to the principle that every woman must be free to decide if and when to have children according

to the dictates of her conscience and religious beliefs. [1] Amici view reproductive choice as an element of religious liberty; they promote this belief through education and outreach programs. [2]

Religious liberty can flourish only in a society that respects the full panoply of human beliefs and the dignity of all persons whatever religious or social views they may espouse. Unrestricted debate on social and religious issues, along with peaceful acts of civil disobedience to bring about social change, are fundamental aspects of this ethic. Violence is incompatible with it.

Petitioners have engaged in a lengthy national campaign of threats and violence against women seeking medical care from reproductive health clinics and against the clinics themselves, often in the name of religion and always invoking their constitutional right to oppose abortion. The lower courts applied federal law to prohibit petitioners' violent efforts to impose their views on others, yet allowed petitioners to peacefully assemble, speak and pray in furtherance of their beliefs. Those courts, in our view, struck the proper balance between

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the amici curiae, their members or counsel, made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk.

[2] Individual statements of the amici curiae are attached in the Appendix.

protecting the constitutional freedom to peaceably advocate social change while prohibiting the violent curtailing of the freedom of others to act differently and to adhere to different beliefs. It is important to us and to all who seek peaceful social change that our activities not be tarnished by the false invocation of religious and constitutional freedom to justify violence, threats and fear.

The legal theorist Zechariah Chafee once observed, "[m]ost of us believe that our Constitution makes it possible to change all bad laws through political action. We ought to disagree vehemently with those who urge violent methods, and whenever necessary take energetic steps to prevent them from putting such methods into execution." Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 178 (Harvard University Press 1942). We see this Court's upholding of the Seventh Circuit's decision as an important step in the ongoing process of vigilantly protecting our constitutional rights while preventing their corruption by the use of force and violence in place of appeals to reason.

INTRODUCTION

The Seventh Circuit affirmed a jury verdict that petitioners (defendants below) had violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by using actual and threatened force and violence to prevent patients of medical clinics which perform abortions from availing themselves of the clinics' services.

> [P]rotesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious

> conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

NOW, Inc. v. Scheidler, 267 F.3d 687, 693 (7th Cir. 2001), *cert. granted*, __ U.S. __, 122 S. Ct. 1604 (2002). Noting that "[a]ll parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions," the court made clear that this peaceful conduct was not actionable: "We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct." *Id.* at 700.

The critical distinction between defendants' constitutionally protected rights of speech, assembly and religion and their unlawful acts and threats of violence was highlighted in the nationwide injunction entered by the district court to implement the jury verdict. The defendants are enjoined from--

> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any

> building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic; [and]
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic. . . .

Id. at 705. These restraints are circumscribed by the injunction's explicit limitations, which allow defendants to peacefully picket, to make speeches, to talk to prospective clinic patients, to hand out literature and to pray on public property in front of a clinic. *Id.*

The decisions below, in short, carefully followed the guidelines set by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), for the proper adjudication of social protests containing a mixture of protected and illegal activities. The lower courts manifestly did not interfere with defendants' constitutionally protected rights of free speech, assembly and religion. On the contrary, they honored those rights and expressly protected them in the injunction.

The issues before this Court therefore raise no constitutional challenge, focusing instead on interpreting the federal statutes the lower courts employed to insure

"[t]he protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment. . . ." *Scheidler*, 267 F.3d at 702. These issues of statutory construction concern the scope and proper implementation of RICO's injunctive provisions and the use of the Hobbs Act, 18 U.S.C. § 1951, to protect intangible property rights from extortion. We believe that both issues were correctly decided by the Seventh Circuit.

SUMMARY OF ARGUMENT

(1) Injunctive Relief is Legally Appropriate in Private RICO Lawsuits

Following a jury verdict for respondents (plaintiffs below), the District Court for the Northern District of Illinois enjoined defendants for a twelve year period from engaging in the illegal conduct that violated RICO. *See NOW, Inc. v. Scheidler*, No. 86-C-7888, 1999 U.S. Dist. LEXIS 11980, at *59-64 (N.D. Ill. Jul. 16, 1999). The Seventh Circuit affirmed, holding that 18 U.S.C. § 1964 authorizes injunctive relief in a suit by private plaintiffs. *See NOW, Inc. v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001). The Ninth Circuit, the only other Circuit to directly address this issue, held in *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), that a RICO injunction was not available to private plaintiffs.

Acknowledging the *Wollersheim* decision, the Seventh Circuit disagreed with the Ninth Circuit's interpretation of and reliance on RICO's conflicting legislative history. Finding RICO's text to be unambiguous, the Seventh Circuit held that reference to

legislative history to contradict the statutory language would be inappropriate, *Scheidler,* 267 F.3d at 695-96, 699, and that 18 U.S.C. § 1964 plainly authorizes the district courts to grant injunctive relief to all RICO plaintiffs, private as well as governmental. *Id.* at 697-98.

The Seventh Circuit's conclusion is supported by a fair reading of RICO's language, as it gives effect to all subsections of § 1964. In addition, nothing in § 1964 can fairly be read to eliminate the district courts' inherent authority to grant injunctive relief to private plaintiffs even if § 1964 itself did not independently confer equitable powers on the courts when they are deciding private RICO lawsuits.

(2) Intangible Property Rights are Protected Against Extortion by the Hobbs Act

The Hobbs Act criminalizes activity that "obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion. . . ." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

It has long been settled that the "property" protected by the Hobbs Act is not limited to tangible assets, but also includes intangible property rights that contain an element of wealth or potential economic benefit which the property owner has the power to use and control. It logically follows, then, that an extortionist violates the Hobbs Act by wrongfully obtaining control over the intangible property rights of his victim even

though he does not receive any physical items. The Seventh Circuit correctly held that the term "obtaining," as applied to intangible property covered by the Act, is satisfied when the extortionist uses threatened or actual force, violence or fear to wrest from the victim the power to use or control its intangible property rights, as defendants did here.

ARGUMENT

I. RICO AUTHORIZES THE DISTRICT COURTS TO GRANT INJUNCTIVE RELIEF IN PRIVATE LAWSUITS

A. RICO's Plain Language and Structure Authorize Injunctive Relief to Private Plaintiffs

RICO's civil remedy provisions, 18 U.S.C. § 1964, are contained in three subsections. The first, subsection (a), is a straightforward grant of equitable power to the district courts "to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders." It goes on to delineate a non-exclusive list of permissible forms of equitable relief.

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Subsection (a) neither identifies nor limits the RICO plaintiffs who may receive injunctive relief. It thus creates an equitable right that is coextensive with the right to sue to enforce the substantive prohibitions of RICO § 1962. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

The parties who may sue as RICO plaintiffs are identified in § 1964's subsections (b) and (c). Section 1964(b) authorizes the government to "institute proceedings under this section," adding that the government may request preliminary injunctive relief and accept performance bonds from the defendants. Subsection (c) authorizes private persons who are injured in their "business or property by reason of a violation of section 1962" to "sue," adding that they shall recover treble damages and their costs, including reasonable attorney fees.

Subsections (b) and (c) do not expressly reference § 1964's subsection (a). Neither subsection expressly limits the scope of subsection (a), and neither expressly states that one RICO plaintiff but not others may sue to enforce § 1964's equitable provisions. As written, the statute authorizes private plaintiffs to sue for the equitable relief sanctioned in subsection (a) for the same reason that the government is so authorized: the natural

reading of § 1964 as a whole is that subsection (a) applies with equal force to all parties identified in the subsections following it. *See Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984), where the court denied defendants' motion to strike plaintiff's claim for equitable relief holding that § 1964(a) applies equally to private plaintiffs and the government.

To hold otherwise, this Court would need to effectively amend subsection (b) by inserting the word "only" into its text, making the lead sentence read "[Only] the Attorney General may institute proceedings under this section." That concoction of exclusivity would improperly change the sentence's plain meaning -- a grant to the government of a non-exclusive right to sue for equitable relief under § 1964(a).

B. RICO Does Not Expressly Preclude An Award of Injunctive Relief to Private Plaintiffs

In *Franklin v. Gwinnett County Pub. Sch.*, this Court reiterated the long-standing presumption that "all appropriate remedies" are available under a statute that provides a private right of action "unless Congress has *expressly indicated* otherwise." 503 U.S. 60, 66 (1992) (emphasis added). "[A]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979).

Nothing in RICO's language can fairly be read to prohibit federal district courts from using their historical authority to grant equitable relief to private plaintiffs

when appropriate. Judge Rakoff of the Southern District of New York recently so held, concluding that RICO "nowhere expressly denies courts this [injunctive] power in private civil actions, and thus the normal presumption favoring a court's retention of all powers granted by the Judiciary Act of 1789 prevails." *Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 244 (S.D.N.Y. 2002). See, to the same effect, *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910 (E.D.N.Y. 1983), *aff'd*, 730 F.2d 905 (2d Cir. 1984). That interpretation of RICO is correct.

Section 1964(a)'s failure to identify the parties that may seek equitable relief does not exclude any party from its scope even inferentially, let alone expressly. As noted above, subsection (b)'s authorization of governmental equitable proceedings is not exclusive on its face. And subsection (c)'s grant of a treble damage remedy to private parties is hardly an express indication that those parties are precluded from obtaining equitable relief. Section 1964, in short, does not affect the district courts' traditional equitable powers.

This conclusion is reinforced by Congress' directive that RICO should be "liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). As this Court has noted, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 491 n.10 (1985). Any ambiguity in the text is therefore clarified by the Congressional mandate to liberally construe § 1964 to "prevent and restrain" RICO violations. The courts below properly granted injunctive relief to the plaintiffs so as to effectuate RICO's remedial purpose and "make good the wrong

done." *See Franklin*, 503 U.S. at 66, *quoting Bell v. Hood*, 327 U.S. 678, 684 (1946).

C. Analysis of the Clayton Act's Equitable Relief Provisions Does Not Support a Different Result

Comparing the similar language of RICO § 1964(c)[3] and § 4 of the Clayton Act,[4] defendants argue that since § 4 has been interpreted to not grant private plaintiffs the right to equitable relief, § 1964 (c) should be equally limited. That comparison is flawed.

There is no question but that RICO § 1964(c), by itself, does not address the question of whether equitable relief may be awarded to private plaintiffs. But, as discussed *supra*, pp. 8-10, when subsection (c) is read in conjunction with § 1964(a), the language of the two

---

[3] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c), as enacted (1970).

[4] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15, as enacted (1970).

linked provisions plainly authorizes injunctive relief in private lawsuits. The Clayton Act reaches the same result by a different route.

Although § 4 of the Clayton Act does not permit private equitable relief, another section of the Act, § 16, does. At the time of RICO's enactment, § 16 provided that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws.... 15 U.S.C. § 26 (1970).

Similarly, the government is authorized to seek equitable relief in another self-contained Clayton Act provision, § 15, which read as follows at the time of RICO's enactment:

> The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. 15 U.S.C. § 25 (1970).

In short, the Clayton Act authorizes governmental and private equitable relief in two separate statutory provisions, § 15 and § 16, with each separate section

granting equitable rights and expressly identifying the parties that may enforce those rights. RICO covers the same ground in a different format. It authorizes the district courts to order equitable relief in the opening provision of § 1964, subsection (a), and then identifies the parties who may sue for that relief in the two following subsections, (b) and (c), which deal separately with the government and private parties. While structurally different, both enactments reach the identical result: each authorizes all plaintiffs, private and governmental, to sue for injunctive relief.

D. Public Policy Supports the Seventh Circuit's Holding that RICO Authorizes Injunctive Relief to Private Parties

Should the district court's nationwide injunction be overturned, the inevitable result would be a multiplicity of costly, inefficient lawsuits, jurisdiction by jurisdiction, with repetitive challenges to the same illegal conduct by the same plaintiffs against the same defendants. As noted by the district court, without a nationwide injunction defendants would legally be able to cross state lines to avoid restraints entered against them in one jurisdiction while continuing to engage in the identical illegal conduct at different clinics in other jurisdictions. *See Scheidler*, 1999 U.S. Dist. LEXIS 11980, at *52. A nationwide injunction is therefore necessary to effectively deter illegal nationwide plans to foment violence against health clinics, and to avoid wasting limited judicial resources by requiring plaintiffs to engage in the same litigation against the same defendants over and over again.

II. THE USE OF FORCE, VIOLENCE OR FEAR TO PREVENT A BUSINESS FROM EXERCISING CONTROL OVER ITS INTANGIBLE PROPERTY RIGHTS IS EXTORTION UNDER THE HOBBS ACT

A. Hobbs Act "Property" Includes Intangible Things of Value and the Right to Use and Control Them

The property protected by the Hobbs Act has never been confined to physical assets; it has always "include[d], in a broad sense, any valuable right considered as a source or element of wealth." *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969). Every Circuit which has addressed the issue has adopted this meaning.[5] As a result, over the years numerous intangible "valuable rights" have been found to be covered by the Act. *See, e.g., United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), *cert. denied*, 415 U.S. 1024 (1986) (right to make personal and business

---

[5] *See, e.g., United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999), *cert. denied*, 531 U.S. 811 (2000); *United States v. Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989); *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987); *United States v. Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); *United States v. Hathaway*, 534 F.2d 386, 395 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976).

decisions about the purchase of life insurance); *Hathaway*, 534 F.2d at 395 (right to procure a no-bid contract); *Tropiano*, 418 F.2d at 1076 (right to solicit business).

The concept of a right having economic worth separates intangible property from other intangible values, such as civil rights or liberty interests whose worth is not measured in economic or financial terms. *Compare McNally v. United States*, 483 U.S. 350, 359 (1987) (holding that the right to "good government" is not property under the mail fraud statute) *with Carpenter v. United States*, 484 U.S. 19, 25 (1987) (holding that confidential business information is property under the mail fraud statute). *See generally G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 256-57 (S.D.N.Y. 2001) (the First Amendment right to petition the government is not property that can be extorted because there is no direct nexus between petitioning the government and increasing personal wealth).

Just like tangible assets, valuable intangible property is protected by the Hobbs Act because the owner's control over these intangible rights enables her to make business decisions about their use free from outside influence. "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

When a property owner loses these rights, she loses her property. "[T]he 'property' of which the victim is deprived need not be tangible, but may be no more than the right to make his business decisions free of threats and coercion." *See Lewis*, 797 F.2d at 364.

"There can be no conception of property aside from its control and use . . . If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." 73 C.J.S. § 5 at 170 (1983).

The same indicia of valuable intangible property -- economic worth and the right of use and control -- defined the contours of the property covered by New York's extortion statute, the Penal Law of 1909, on which the Hobbs Act was based. *See Evans v. United States*, 504 U.S. 255, 261 n.9 (1992). Well before Congress passed the Hobbs Act in 1946, New York courts had held that property protected by the Penal Law included "every species of valuable right and interest," *People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698 (N.Y. App. Div. 1911), including the right to "free use, enjoyment, and disposal of all the owner's acquisitions, without any control or diminution, save only by the laws of the land." *People v. Barondess*, 16 N.Y.S. 436, 443-44 (N.Y. Sup. Ct. 1891), *dissenting opinion adopted on appeal*, 31 N.E. 240 (N.Y. 1892). Relying on *Short* and *Barondness*, the New York Court of Appeals applied these principles to a modern extortion case in *People v. Spatarella*, 313 N.E.2d 38 (N.Y. 1974), holding that business generated from a particular source is property that can be extorted. 313 N.E.2d at 39-40.

Thus, it has long been settled that the Hobbs Act's concept of property includes all intangible rights having present or potential economic value which the owner is empowered to control and use. This definition encompasses the right of the plaintiff health clinics to provide reproductive health care services to their female patients, as well as the patients' contractual rights with the clinics. The right to provide or receive medical

services is unquestionably a "valuable right considered as a source or element of wealth." *Tropiano*, 418 F.2d at 1075. Indeed, two Courts of Appeal in addition to the Seventh Circuit have specifically held that the right of a women's health clinic to provide reproductive health care services to its patients is Hobbs Act property. *See Arena*, 180 F.3d at 392; *McMonagle*, 868 F.2d at 1350. Those decisions are correct and should be upheld.

B. An Extortionist "Obtains" a Victim's Intangible Property Rights When He Prevents the Victim From Using or Exercising Control Over Those Rights

Preventing a property owner from using or exercising control over her property has the practical effect of taking the property from her.

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use.

Spann v. City of Dallas, 235 S.W. 513, 514-15 (Tex. 1921).

By parity of reasoning, the transfer to an extortionist of control over the right to use, enjoy and dispose of property does not require the extortionist to obtain physical possession of the property from the victim. On the contrary, a holding that would require a transfer of physical assets from the victim to the extortionist would excise intangible property rights from

the coverage of the Hobbs Act. For this reason, the Courts of Appeal have uniformly interpreted the term "obtaining" to mean any act or threat of force or violence that prevents a victim from using or exercising control over her intangible property rights. *See* fn. 4, *supra.*

An extortionist who uses violence to effect a wrongful transfer to himself of control over his victim's right to conduct her business as she sees fit has obtained the precise property that he set out to take. *See, e.g., Arena*, 180 F.3d at 394; *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir.), *cert. denied,* 516 U.S. 945 (1995); *Santoni*, 585 F.2d at 673. Nothing more could be – or need be – obtained by the extortionist to effectuate his illegal scheme.

This point is illustrated by the decision in *United States v. Green*, 350 U.S. 415 (1956), where a union official used threats of violence to try to force an employer to pay wages for fictitious work. *Id.* at 417-18. The district court ruled that no Hobbs Act violation had occurred because neither the official nor the union was to have received money from the employer. *Id.* at 418 n.2. This Court reversed, holding that "extortion as defined in the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." What the extortionist has wrongfully obtained is the power to control the victim's property. *Id.* at 420. *See also Arena*, 180 F.3d at 394 (an extortionist obtains property when he forces a property owner to abandon the property, because the extortionist then controls the property's fate).

The same is true in this case. Defendants wrongfully gained control over the clinics' ability to provide medical services (and their patients' right to receive them) by using all kinds of violent tactics that either kept patients away or physically destroyed the clinics' property. *See NOW, Inc. v. Scheidler*, 267 F.3d 687, 695 (7th Cir. 2001) (listing examples of the violent tactics employed by defendants). When they wrongfully obtained control over the health clinics' businesses, the defendants acted no differently than the corrupt officials and organized crime figures who wrongfully obtain the property of legitimate businesses by gaining control over their decision-making processes. *See, e.g., Stephens*, 964 F.2d at 433 n.20; *Zemek*, 634 F.2d at 1174; *Santoni*, 585 F.2d at 672-73; *Tropiano*, 418 F.2d at 1075-76.

C. Defendants' Liability will not Convert Constitutionally Protected Acts of Peaceful Civil Disobedience into Illegal Extortion

Defendants contend that if this Court upholds the judgments against them, "Hobbs Act offenses could be pursued against social protesters of all stripes, including those protesting for civil rights, environmental causes, or animal rights." Scheidler Brief at 35. Defendants err by equating their illegal use of force and violence with peaceful social protest. Constitutional protection has never been afforded to acts of force or violence even when they are intermixed with lawful protest activity. *See Claiborne Hardware*, 458 U.S. at 916. To violate the Hobbs Act, an extortionist must exceed constitutional boundaries by employing "actual or threatened force, violence or fear," as defendants did here. The Hobbs Act would not be implicated if any social protester were to

obtain "property from another" through constitutionally protected means.

Defendants also assert incorrectly that Congress did not intend the Hobbs Act to reach political protestors. Scheidler Brief at 5 n.23. The Eighth Circuit rejected this exact argument in *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973). There, a member of the Congress for Racial Equality was convicted of violating the Hobbs Act; on appeal, he argued that the Act was not intended to apply to militant civil rights activity. *Id.* at 193. Affirming the conviction, the court held that the Hobbs Act prohibits all forms of extortion, no matter the identity or cause of the perpetrator.

> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion is extortion, whether or not the perpetrator has a union card. It covers whoever in any way or decree interferes with interstate foreign commerce by robbery or extortion.

Id. (quoting 89 Cong. Rec. 3217 (1943)).

Defendants' argument boils down to a plea that "motive" should determine whether one is subject to Hobbs Act liability, *i.e.*, that legitimate ends may justify vile means. That misguided concept has never been part of United States law for good reason. As the Seventh Circuit cautioned in an earlier opinion: "If a religious, moral, or political purpose may exculpate illegal behavior, one might commit bigamy to avoid eternal

damnation; steal from the rich to give alms to the poor; burn and destroy, not merely public records or perhaps buildings but even public servants as well, to implement a Utopian design." *See United States v. Cullen*, 454 F.2d 386, 392 (7th Cir. 1971).

Offensive and even coercive speech, on the other hand, is constitutionally protected "'so long as the [protester's] means are peaceful.'" *Claiborne Hardware*, 458 U.S. at 911, *quoting Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Here, judgment was rendered only against defendants' violent means. Having chosen violence, defendants cannot now avoid the legal consequences by cloaking themselves in the mantle of peaceful social protest.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

Of Counsel
BONNIE J. CAMPBELL
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

GEORGE R. KUCIK
Counsel of Record
J. MARCUS MEEKS
BONNIE L. KANE
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 857-6084

September 17, 2002

APPENDIX A

STATEMENTS OF INTEREST

The Religious Coalition for Reproductive Choice, founded in 1973 by clergy and laity, is a non-partisan, non-profit education and advocacy organization of national groups and caucuses from major denominations including the Episcopal Church, Presbyterian Church (USA), United Church of Christ, United Methodist Church, Unitarian Universalist Association, and Reform and Conservative Judaism. Each member group of the Coalition has an official statement regarding reproductive choice that has been adopted by its governing body. Although the membership has diverse views about abortion rights, all agree that decisions about family, including whether and when to have children, are matters of individual conscience that must be made free of coercion and violence of any kind.

Disciples for Choice is an organization of members of the Christian Church (Disciples of Christ) and friends of the cause of reproductive choice. The stance of responsible freedom is supported historically by General Assembly Resolutions #24 (San Antonio, 1975), which read in part: "Therefore be it resolved that the General Assembly... [r]espect[s] differences in religious belief concerning abortion and oppose[s] in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans...."

Americans for Religious Liberty (ARL) is a non-profit public interest educational organization dedicated to defending religious liberty, freedom of conscience, and First Amendment rights. ARL has participated as an amicus curiae in cases before the Supreme Court and other courts where these concerns have been implicated.

The American Humanist Association (AHA), founded in 1941, has members and affiliates throughout the United States. The AHA affirms the right to privacy and the right of every woman to freedom of conscience and freedom of choice in dealing with problem pregnancies. The AHA has participated as an amicus curiae in cases involving freedom of conscience and religious liberty concerns.

The National Council of Jewish Women, Inc. *(NCJW)* is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has members in over 500 communities nationwide. Given NCJW's National Priorities, which state, "We endorse and resolve to work for the protection of every female's right to reproductive choice, including safe and legal abortion, and the elimination of obstacles that limit reproductive freedom," NCJW joins this brief.

United Church of Christ Justice and Witness Ministries, one of four Covenanted Ministries in the United Church of Christ, helps local congregations and all settings of the church to respond to God's commandments to do justice, seek peace, and effect change for a better world. The

work of Justice and Witness Ministries is guided by the pronouncements and resolutions approved by the General Synod of the United Church of Christ.

Lutheran Women's Caucus comprises women of the Evangelical Lutheran Church of America and Lutheran Church-Missouri Synod. The Caucus adopted a statement at its 1990 convocation gathering urging compassionate support for women with an unintended pregnancy and an end to harsh judgments against women who have abortions.

The Women's Rabbinic Network of the Central Conference of American Rabbis comprises more than 200 female Reform Movement rabbis and rabbinical students. The 20 year-old Network is an official arm of the Central Conference of American Rabbis (CCAR), the rabbinic organization of the Reform Movement in the United States.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. In particular, the Association has adopted numerous resolutions affirming the principles of separation of church and state and personal religious freedom. Most relevant to the case at bar are the Association's resolutions specifically supporting the fundamental right of individual choice in reproductive matters and the right of a female to have an abortion at her own request upon medical/social consultation of her own choosing.